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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BREWSTER KAHLE,
INTERNET ARCHIVE,
RICHARD PRELINGER,
and PRELINGER ASSOCIATES, INC.,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant.

Civil Case No. C 04 1127 BZ

CIVIL COMPLAINT FOR DECLARATORY JUDGMENT

COPY

Dockets.Justia.com

COMPLAINT

This case is an action for declaratory relief pursuant to 28 U.S.C. § 2201. It arises from the conflict between two fundamental changes that have affected the ability of individuals to cultivate and spread culture. One change is technological; the other is legal.

The technological change is the birth and spread of the Internet. The Internet has created an extraordinary opportunity for individuals, including Plaintiffs, to cultivate and spread our culture. No single technological change in the history of the American Republic has more profoundly affected the potential for democratic speech and the spread of knowledge.

The legal change is the radical shift in the nature and extent of copyright regulation. For almost 190 years of the American Republic, copyright law was purposefully tailored to regulate extremely narrowly. Given the nature of creative production, and the limits to the law, copyright burdened relatively few — especially few beyond commercial creators. The law thus left essentially unburdened archivists, preservationists, libraries, and non-commercial creators.

This traditional pattern has now changed. Whereas copyright regulation before was the exception, it is now the rule. Whereas the burden of copyright before was effectively limited to works that had continuing commercial viability, the burden of copyright now is spread broadly and indiscriminately to all creative works regardless of any continued commercial interest in the copyright. Whereas traditionally, the contours of American copyright law guaranteed that this regulation of speech was reasonably and effectively tailored to a viable commercial interest, today this regulation of speech burdens effectively all creative work, regardless of any continuing commercial interest in "Authors" to control its dissemination or use.

Some of these changes in the law have importantly strengthened the rights of creators to control and profit from the distribution of their works. That is the proper aim of copyright, with which Plaintiffs have no quarrel.

But because of the radically indiscriminate nature of the most recent of these changes, the law has also produced an extraordinary "orphan class" of creative work — work that the author has no continuing interest to control, but which, because of the burdens of the law, no one else can effectively and efficiently archive, preserve, or build upon in the digital environment for a term now reaching almost a century.

This is an important and radical change in the nature of copyright law, coming just at a time when technology could enable the archiving, preservation, and reuse of content at a level never imagined before. For 186 years, American law limited the grant of copyright to those authors who claimed the need for copyright's benefit. But because of the indiscriminate nature of copyright today, the burden of copyright regulation extends to work whether or not the original author has any need for continuing protection. That unnecessary burden blocks the cultivation of our culture and the spread of knowledge.

Plaintiffs, the Chairman and the President of two archives that post public domain books, films, audio, and other creative works on the Internet, and the archives themselves, seek declaratory judgment:

(1) that the Berne Convention Implementation Act (BCIA) is unconstitutional under the Free Speech Clause of the First Amendment, and

(2) that the BCIA and Copyright Term Extension Act (CTEA) together create an "effectively perpetual" term with respect to works first published after January 1, 1964 and before January 1, 1978, in violation of the Constitution's Progress Clause.

Plaintiffs also seek preliminary and permanent injunctive relief against the criminal enforcement of § 2(b) of the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. 506(a), with respect to works first published after January 1, 1964 and before January 1, 1978.

PARTIES

1. Plaintiff Brewster Kahle resides at 513B Upper Simonds Loop, San Francisco, California 94129.

2. Plaintiff Internet Archive is a 501(c)(3) public nonprofit corporation located at The Presidio of San Francisco, 116 Sheridan Avenue, San Francisco, CA 94129, and found on the Internet at <http://www.archive.org/>. Internet Archive's principal activity is to build

an "Internet library," with the purpose of offering permanent and free access for researchers, historians, and scholars to works — including audio, books, films, websites, and software — that exist in digital format. Internet Archive is currently working, in partnership with Carnegie Mellon University, the National Science Foundation, and the governments of India and China, on the "One Million Book Project," which is an effort to create a digital archive of one million books in fully-readable online text format.. Among the books to be offered will be a large number of "orphan" works — i.e., books that remain under copyright, but are out of print and therefore not widely available to the public. Internet Archive also operates the "Internet Bookmobile", a mobile Internet bookstore that downloads, prints and binds public domain books for $1 each. Plaintiff Kahle is the Chairman of the Board of Internet Archive.

3. Plaintiff Richard Prelinger resides at 649 15th Avenue, San Francisco, California 94118.

4. Plaintiff Prelinger Associates, Inc., a New York corporation known in the trade as Prelinger Archives, was founded in 1983 by Plaintiff Richard Prelinger in New York City and incorporated in 1985. In 20 years, it has grown into a collection of over 48,000 "ephemeral" (advertising, educational, industrial, and amateur) films. Prelinger Archives provides stock footage to the media and entertainment industries through its authorized sales representative, Getty Images, and is supported by royalty payments from Getty. In 2002, the film collection was acquired by the Library of Congress. Prelinger Archives remains in existence, holding approximately 4,000 titles on videotape and a smaller collection of film materials acquired subsequent to the Library of Congress transaction. Its goal remains to collect, preserve, and facilitate access to films of historic significance that have not been collected elsewhere, or made commercially available elsewhere. Included are films produced by and for many hundreds of important U.S. corporations, nonprofit organizations, trade associations, community and interest groups, and educational institutions. The collection, including the portion acquired by the Library of Congress, currently contains over 10% of the total production of ephemeral films between 1927 and 1987, and it may be the most complete and varied collection in existence of

films from these poorly preserved genres. Plaintiff Richard Prelinger is the President of Prelinger Associates, Inc.

5. Defendant John Ashcroft is the Attorney General of the United States and the head of the United States Department of Justice. Ashcroft is responsible for the enforcement of the copyright and criminal laws of the United States, including the Copyright Act of 1976 (Copyright Act), BCIA, CTEA, and NET Act.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201, because this declaratory judgment action challenges the constitutionality of federal statutes. There is personal jurisdiction over defendant Ashcroft. Venue is properly laid in this District under 28 U.S.C. § 1391(e).

STANDING

7. Plaintiffs have standing to bring and maintain this action because their activities have been, and will continue to be, directly affected by the Copyright Act, BCIA, CTEA, and NET Act. Plaintiffs have for many years routinely taken films, music, books and other creative works that are in the public domain and have posted those works on the Internet. Plaintiffs plan to continue to do so for the indefinite future. Among the works that plaintiffs had been preparing to post on the Internet are works created between 1964 and 1978, that, but for enactment of the BCIA and CTEA, could have been legally copied and distributed on January 1, 2004. The total retail value of such works would exceed $1,000.

8. The Copyright Act can be civilly enforced against Plaintiffs and, through the NET Act, criminally enforced as well. In addition, Plaintiffs' constitutional rights to freedom of expression have been chilled by enactment of the BCIA and the CTEA.

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BACKGROUND

A. Technological Changes Affecting the Cultivation of Culture and Spread of Knowledge

9. Digital technologies have profoundly changed the nature and economics of creativity and the preservation of creativity. In particular, they have changed the efficiency with which creative work can be created, preserved, copied, and integrated, and the efficiency with which it can be spread.

10. Digital technologies have changed the efficiency with which work can be created, preserved, copied, and integrated by providing a common platform upon which creative work can subsist. This "digital platform" makes it inexpensive to create and restore creative work. It enables perfect and inexpensive copies of any digitized work. And because sound, images and text reside on a common platform, it allows work to be more easily integrated.

11. Apple's iLife technologies are examples of this creative capacity. iLife is a suite of technologies for manipulating digital content, including technologies for manipulating sound (iTunes), still images (iPhoto), and moving images (iMovie). Each of these technologies enables the user to organize and manipulate digital objects. iMovie enables the user to integrate moving images with still images and sound. Each also enables the user to produce copies of the digital objects that they manipulate. iLife includes a technology (iDVD) to enable users to burn DVDs of their content.

12. Plaintiff Internet Archive is an example of this preservation capacity. The Internet Archive, <http://www.archive.org>, offers free access to over 300 terabytes of content — more than 10 times as much data as all of the text in the Library of Congress. The archive has over 30 billion Web pages, archived from the beginning of 1996. It hosts over 33,705 audio, video, and texts-based works, available for free download from its site. The Internet Archive also hosts 3,173 moving images, ranging from graduate-level mathematics lectures to independent news and ephemeral films. The archive's texts collection contains 21,633 public domain works, including the first 10,551 books

digitized pursuant to a "Million Book" project. Users have contributed 7,643 live concert recordings, 1,043 studio recordings, and 213 radio programs to the audio collection. The cost of storing this content is less than $1 million per year. And because the cost of digital storage continues to fall dramatically, the cost of storing a terabyte of data continues to decline each year.

13. Digital technologies have also radically improved the efficiency with which work can be spread.

14. At the core of these technologies is the Internet.

15. The Internet is a network of networks linked by a common suite of protocols (referred to as "TCP/IP"), which enables content to be spread efficiently around the world.

16. The Internet originated in 1968 as a research program funded by the Defense Advanced Research Projects Agency (DARPA). Initially limited by rule to noncommercial activities, in 1992 the commercial restriction was lifted. Since 1992, the Internet has linked networks established by individuals, governments, businesses, universities and non-profit organizations. Today, the Internet is believed to have more than 650 million users worldwide.

17. Among the protocols within TCP/IP are protocols to enable the "World Wide Web." "The Web" is a collection of easily accessible files and databases located on machines across the Internet. Machines host "Web sites" which provide resources associated with a certain person or organization. An individual or organization with a Web site can "post" a message, document, or other type of information on the Web. Anything posted openly on the Web can be read and copied (or "downloaded") by anyone who has access to the Internet.

18. Another protocol within TCP/IP is a protocol for transferring files across the Internet. This protocol is known as "FTP." With this protocol, computers on the Internet can exchange files. These files can contain documents, or images, or sound, or any other content saved in a digital form.

19. Project Gutenberg, <http://promo.net/pg/>, is an example of the access capacity enabled by these protocols. Through a massive, worldwide, voluntary effort, Project Gutenberg has digitized thousands of public-domain books and made them available for free. These books are available using the protocols of the Web, or FTP. As a consequence, this library of public-domain works is now available to the world at no cost (beyond the cost of Internet connectivity). Before the Internet, the same access would have cost literally millions of dollars.

20. These Internet protocols have also been integrated into commercial and noncommercial applications. Again, for example, Apple's iLife technologies integrate directly with Apple's Web service, .Mac, so content produced using iLife can immediately be published to the Web. Many other commercial and noncommercial services offer similar functionality — including Kodak's Ofoto service, and Six Apart's "TypePad" Weblog hosting service.

21. The suite of Internet protocols, and the applications and services that take advantage of these protocols, have made possible a previously unknown freedom of speech. Anyone with access to the Internet can make creative content available to anyone else in the world at a marginal cost approaching zero. For the first time in history, borders need not limit publication, and economics need not restrict the spread of knowledge.

22. The suite of Internet protocols, tied to the falling cost of digital storage, also means that for the first time in history, archives of knowledge and culture can be made available cheaply around the world. For the first time in history, the dream of the Library of Alexandria is a possibility — not just for the few with access to a remote but universal library, but for anyone with access to the Internet.

23. Plaintiff Prelinger Archives is an example of the distributive capacity. Because of the falling costs and economies of scale of online digital distribution, Prelinger Archives is able to make its film holdings widely accessible at a fraction of the traditional costs. The archive has made 1,620 motion pictures available on-line, through the Internet Archive, including industrial, advertising, educational, amateur, newsreel and actuality films.

These works are available for free viewing, or can be downloaded for a variety of purposes, including for transformative use of portions of a motion picture in a derivative work. Since January 2, 2001, there have been over 1.5 million downloads from the Prelinger Archives, and many of these downloads have been for the purpose of transformative uses.

24. Because of these technologies, the costs of publishing material to the world have fallen dramatically. Using simple and inexpensive technologies for digitizing and marking content, content can be made available to any computer across the world. This change in turn has inspired many to build free libraries of content available to anyone on the Net. It has also inspired many businesses to publish content they otherwise would not have published. These technologies, in short, have exploded the opportunities for free speech, learning, and culture around the world.

B. Legal Changes Affecting the Cultivation of Culture and Spread of Knowledge

25. At the same time that technology has been lowering profoundly the costs of cultivating culture and spreading knowledge, radical changes in the nature and scope of copyright law have been increasing those same costs. These changes arise from specific amendments that Congress has made to the federal copyright law, but these changes, fundamentally at odds with the tradition of copyright law in America, are all of recent origin.

26. These changes have been driven by the legitimate and valuable objective of benefiting authors and creators in their ability to exploit their work commercially. But the unintended consequence of these changes in the law has been to radically burden other important uses of knowledge and creative work, after the commercial life of that content has expired.

27. The law thus effectively "orphans" this creative work. Plaintiffs' sole focus in this challenge is upon this orphaning effect.

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(1) The Constitutional Source of Congress' Copyright Regulation

28. Congress's power to regulate speech through copyright law is grounded in the Constitution. Article I, § 8, cl. 8, referred to herein as the "Progress Clause," gives Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

29. The Progress Clause is "both a grant of power and a limitation." *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (slip. op. 21), quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

30. The "grant of power" is the power to "promote the Progress of Science."

31. The "limitation[s]" are those specified in the balance of the clause — that the "exclusive right" be granted "to Authors" for "their ... Writings" and "for limited Times." Congress has no power, pursuant to Article I, §8, to grant a copyright to anyone but an "Author." It has no power to grant a copyright except for a "Writing." It has no power to grant a copyright except for a term that is "limited."

(2) Conditional *versus* Unconditional Copyright Regimes

32. The traditional pattern of copyright regulation in the United States has recently changed dramatically. That change can be understood by contrasting two types of copyright regimes — conditional and unconditional.

33. A *conditional copyright regime* limits copyright protection to those who take affirmative steps to claim copyright protection. For example, a regime that requires registration of a copyrighted work, or the deposit of a copyrighted work, or the marking of a copyrighted work with copyright notice, or the renewal of the term of protection, is a conditional regime.

34. An *unconditional copyright regime* grants copyright protection whether or not the author or his assigns takes any affirmative steps to claim copyright protection. For example, a regime that grants protection whether or not the work is registered, deposited, marked, or renewed, is an unconditional copyright regime. In each instance, protection is automatic, regardless of the will of the author or his assigns.

(3) The Traditional Contours of the United States Copyright Law: Conditional Copyright

35. For the first 186 years of the Republic, the United States had a conditional copyright regime. The protection of copyright was granted only to those authors, or their assigns, who took affirmative steps to indicate their desire for protection. An author or copyright holder who failed to take these affirmative steps dedicated their works to the public domain.

36. Thus, under the Copyright Act of 1790, Act of May 31, 1790, 1 Stat. 124, the initial term of copyright protection was 14 years. But that term of protection was secured only if the author (1) registered his work, §3 (2) deposited a copy of the work, §4, and (3) provided notice of the copyright in "one or more of the newspapers printed in the United States," §3 ("notice requirement"). Likewise, to secure the benefit of a second term, the Act of 1790 required an author to re-register the work through a process called "renewal." §1.

37. The Act of 1831, 4 Stat. 435, followed the same form. That act extended the initial term of copyright to 28 years, §15, 4. Stat. 439. But the act kept the registration, deposit, and notice requirements of the 1790 regime, see §§ 3 - 5, 4 Stat. 437-48, and kept the requirement that copyright owners renew their copyright to secure the benefits of a second term. § 2, 4 Stat, 436-37.

38. The Act of 1909, 35 Stat. 1075, also preserved this traditional form. That act kept the registration, deposit, and notice requirements. §§ 9, 10, 12, 13, 18, 19. It extended the renewal term of the 1831 Act, but it expressly limited that extension to works that authors had actually renewed. §21.

39. The consequence of requiring these affirmative steps to secure copyright protection was that the overwhelming majority of published works either passed immediately into the public domain (because they were never registered or notice was not given), or passed into the public domain after a relatively short initial term of protection (because their terms were never renewed).

40. Because of the requirements of registration, deposit, and notice, the vast majority of published work historically was never subject to copyright. In the period 1790 to 1800, for example, copyright protected no more than 5% of published works, because only 5% was registered according to the rules of the 1790 Act. The remaining 95% of published work thus moved immediately into the public domain. And while the proportion of registered work grew dramatically over the 186 years that defined the traditional regime, copyright still affected just a small part of the total body of published work.

41. Likewise, the requirement of renewal moved the vast majority of copyrighted work into the public domain after a relatively short initial term. For most of our history, the renewal rate for copyrighted works averaged between 8% and 15%. At its highest, in 1990, the rate was 22%. Renewal rates for different certain classes of works were substantially lower. The renewal rate for books has averaged less than 8%, and for graphic arts, approximately 3%.

42. Thus, using the highest renewal figure for all works, the average term of copyright under the conditional copyright regime at no time exceeded 34.1 years.

43. Although Congress has periodically revisited the copyright law, both to broaden the types of works subject to copyright (e.g., to film, sound recordings, and technical drawings) and to lengthen the term of copyright, for almost two centuries, U.S. copyright statutes retained the core features of a conditional copyright regime — a copyright for a fixed term of years, subject to registration, deposit, notice, and renewal.

44. This conditional regime thus kept a vast amount of creative work wholly free of the burdens of copyright regulation. Even for the subset of works for which authors secured copyright, the conditional regime kept records of the works for which copyright was claimed, and moved most protected work into the public domain after a relatively short initial term. Both the existence and duration of copyright regulation was effectively narrowed to just those works that the author or his assigns desired to protect. The balance of creative work was left free of copyright regulation, or released from protection early.

(4) The Changed Contours of United States Copyright Law: Unconditional Copyright

45. In 1976, Congress began a process to change "the traditional contours" of copyright, *Eldred*, 537 U.S., at 221, by replacing a conditional copyright regime with an unconditional one.

46. In 1976, Congress abolished any registration, deposit, or renewal requirement for works created on or after January 1, 1978. These changes meant that the grant of protection for copyright extended automatically to all works for the full term of copyright, without requiring any affirmative actions by the author or his assigns. Congress has retained a voluntary registration system, and a requirement that U.S.-based works be registered before an infringement suit based upon the work is brought.

47. In 1992, Congress passed the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853, which indiscriminately renewed all copyrights dating from January 1, 1964 to December 31, 1977. Though historical patterns suggest that no more than 8-15% of the copyrights during that period would have been renewed, Congress extended the protection of copyright to all subsisting copyrights even in the absence of any expressed desire by the copyright owners to secure the benefits of an additional term.

48. Finally, in 1998, Congress passed the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827-2828, which unconditionally extended by 20 years the term of all subsisting copyrights, including those automatically extended by the BCIA, regardless of any expressed desire by the copyright owners to secure the benefits of an additional term.

49. These changes have had a profound effect on the nature and reach of copyright regulation.

50. Whereas the traditional contours of a conditional copyright regime assured that the burdens of copyright regulation were narrowed to those works for which the author or his assign desired continued protection, an unconditional regime guarantees that the vast majority of works regulated by copyright serve no continuing commercial or copyright-related interest for their authors.

51. Whereas the traditional contours of a conditional copyright regime produced records both of the material protected and its ownership, an unconditional copyright regime destroys any reliable indication of copyright ownership, or any useful record of current ownership.

52. Whereas the traditional contours of a conditional copyright regime produced, through the renewal requirement, a fresh record of copyright ownership, an unconditional copyright regime guarantees no mechanism to identify the current or even presumptive owner of copyrighted material. This makes subsequent reuse practically impossible for the vast majority of uses that Plaintiffs would enable. Without notice, there is no clear way to know where copyright is claimed. Without a registry, there is no reasonable method for identifying copyright owners.

(5) Extension of Copyright Terms

53. While Congress has historically extended the term of subsisting copyrights, in every case before the CTEA, every subsisting copyright whose term was extended passed at some point through the filter of a renewal requirement. Never were terms extended except in the context of works that would have to be renewed to get the benefit of an extended term.

54. The Act of 1831 extended the initial term of subsisting copyrights from 14 to 28 years, but within a regime that required copyright owners to renew their copyright to secure the benefits of the maximum term of 42 years.

55. The Act of 1909 likewise extended the renewal term of subsisting copyrights, but the act expressly limited its effect to works that had been renewed.

56. And finally, the Copyright Act of 1976 extended the term of subsisting copyrights, but again, only works that were renewed would receive the benefit of the maximum term.

57. Thus, *every extension of subsisting copyrights* until CTEA conditioned the maximum copyright term upon the copyright holder satisfying a renewal requirement. Every extension was thus conditioned by the renewal requirement.

58. In 1998, Congress enacted the CTEA. Among other changes, that Act extended the term of subsisting copyrights by 20 years. This extension was granted indiscriminately to all

subsisting copyrights. But because the renewal requirement survived in American law until 1992, the effect of this extension differed dramatically depending upon the period during which the initial copyright was granted.

59. For registered works published between January 1, 1923 and December 31, 1963, CTEA extended the term of any subsisting copyright by 20 years. But because the average renewal rate for work published between 1923 and 1926 was just 15%, 85% of the work originally copyrighted during that period had already passed into the public domain. Thus, while CTEA extended the terms of subsisting copyrights, the filter of renewal had already eliminated the burden of copyright regulation from the vast majority of copyrights granted during this period.

60. For registered works published between January 1, 1964 and December 31, 1978, CTEA extended the term of subsisting copyrights by 20 years. But because the BCIA had granted an automatic renewal to all subsisting copyrights not yet in their renewal term, CTEA extended the copyright term of a class of works of which, according to historical data, 85% would never have been renewed.

61. CTEA was thus the first statute to extend the copyright term for works that had not been filtered by a renewal requirement. It is thus the first extension in United States history to so unconditionally and indiscriminately extends the burdens of copyright.

(6) The Burden of Unconditional Copyright Regulation

62. This shift to a regime of unconditional copyright regulation has significantly increased the burden of copyright on the freedom to cultivate culture and spread knowledge. While the traditional contours of copyright protection excluded a significant portion of creative work from the regulation of copyright, eliminating those limitations on the reach of copyright significantly burdens speech. These burdens can be understood more precisely according to when the relevant work was copyrighted.

63. Works first published before 1923 are in the public domain. For these works, the changes in copyright law have no effect.

64. Works first published between 1923 and 1964 whose term was not renewed 28 years after their first publication are in the public domain. For those works too, the changes in copyright law have no effect.

65. Works first published between 1923 and 1964 whose terms were renewed 28 years after their first publication now enjoy a 95-year term of protection. This term has been unconditionally extended twice. By a series of extensions between 1962 and 1974, these works were granted an additional term totaling 19 years. They were granted another unconditional 20-year extension by CTEA. Thus, while these works have at least passed through a filter of renewal, unconditional extensions of copyright burden access to these works by presumptively extending their protection by 39 years without any indication by the author or his assigns that such protection is desired, and without producing any effective registry of the current owners of the copyright.

66. It is works first published on or after January 1, 1964 but before January 1, 1978, that are the focus of this action. These works constitute the first class of work in American history that has had its term extended without any requirement of renewal. From historical data, it can be inferred that the vast majority of this work would never have been renewed at the end of its initial 28-year term. Nonetheless, because of the extensions of the Copyright Act of 1976, and the CTEA, the term for this work has been extended by 67 years without any indication by the author or his assigns that such protection is desired, and without producing any effective registry of the current owners of these copyrights.

67. This change to an unconditional copyright regime thus radically burdens access to copyrighted works first published after January 1, 1964 and before January 1, 1978. There is no continuing copyright-related interest in continuing the protection of copyright for the vast majority of this work. While that burden may be slight in the context of commercially viable works — since the fact of commercial availability makes access possible, and makes identifying the copyright owner relatively easy — for the vast majority of works in this period that are not currently commercially available, this unconditional regime effectively orphans them. Internet based archives, libraries, film

restorers, and follow-on creators have no viable or reasonable way to identify copyright owners for this creative work. And with respect to this work, there is no copyright-related benefit from abolishing registration.

(7) **The No Electronic Theft Act**

68. In addition to extending the terms of copyright, Congress has increased the penalty for unauthorized use of copyrighted material. In particular, the No Electronic Theft Act of 1997 (the "NET Act") criminalizes copyright infringement. It amended 17 U.S.C. § 506(a) to provide, in relevant part:

> Section 2. Criminal Infringement of Copyrights. . . . (a) Criminal Infringement. — Any person who infringes a copyright willfully either — (1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000, shall be punished as provided under section 2319 of title 18, United States Code.

69. 18 U.S.C. § 2319(c), in turn, makes it a felony to violate 17 U.S.C. § 506(a)(2):

> (c) Any person who commits an offense under section 506(a)(2) of title 17, United States Code—shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of $2,500 or more; shall be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000.

70. The No Electronic Theft Act, as its name suggests, was enacted to criminalize the violation of copyrights through the posting of copyrighted materials on the Internet. But the statute is not limited to network-based copyright infringement. Instead, it threatens additional criminal penalties for copyright infringement generally. These additional

penalties significantly chill the opportunity of archives such as Plaintiffs' to make even commercially unavailable work accessible to the world.

C. The Effect of These Legal and Technological Changes Together

71. These changes in law and technology together mean that copyright law is now effectively removing much of the creative potential that the Internet provides for works first published after January 1, 1964 and before January 1, 1978. With respect to work that continues to have commercial viability, copyright provides authors and publishers with an important and valuable incentive. But with respect to works that no longer have commercial viability, or for which the author has no continuing commercial interest in preserving a copyright, the law substantially burdens the creative potential of the Internet.

72. The reasons are directly tied to the nature of a digital network, and to the particular form that copyright law now takes.

73. The ordinary trigger for copyright jurisdiction is the making of a "copy." Yet there is no way for a digital network to function without making a copy. Thus, the ordinary use of copyrighted materials on a digital network triggers the regulation of copyright, while the ordinary use of the same materials off the network would not. In contrast to reading a physical book, which does not necessarily involve copying that book, every time a person uses the Internet to view a film, book, or still image, or to listen to a song, that person's computer makes a copy of the work. As a result, copyright law permeates every use of creative work in the on-line environment — including uses that are unregulated in the "analog" world of physical books, films, and recordings.

74. Likewise, although copyright now affects ordinary people much more directly than it did in the world before the Internet, the law has removed the tools that could have allowed users to trace copyright ownership. Within an unconditional copyright regime, the costs of tracing and identifying copyright owners are enormous. Likewise, the legal exposure for publishing work without permission is also enormous. The consequence is that a vast amount of content is unavailable to the Internet, despite the overwhelming probability

that the work either is in the public domain, or is owned by an unknown rights holder who has no continued desire to exercise control over the content.

75. Plaintiffs have experienced these burdens directly. Plaintiffs Internet Archive and Brewster Kahle, for example, in partnership with Carnegie Mellon University, the National Science Foundation, and the governments of India and China, have been working to build a fully-readable online library of one million digitized books. Thus far, however, the difficulty of identifying rights-holders and clearing copyright under current copyright laws has largely limited the Million Book Project to government documents, old texts, and books from India and China, where copyright laws are less burdensome. Though the works within this project are no longer commercially available, the burden of clearing the rights to make them digitally available limits the potential of the project.

76. Plaintiffs Kahle and Internet Archive do not intend to offer, free of charge, digitized versions of copyrighted works that are commercially available. They instead intend to provide access to "orphaned" works, while providing the author or copyright holder the right to request that its work not be made available. But because of copyright regulation, these "orphan" books cannot be made generally available. The project's scope has thus necessarily been restricted. The result is that a vast number of copyrighted yet no longer commercially valuable works sit idle rather than enriching public knowledge.

77. The burden that unconditional copyright places on dissemination is further illustrated by the experience of Plaintiff Richard Prelinger and the Prelinger Archives. Approximately 35% of the motion pictures in the Prelinger Archives prior to the Library of Congress acquisition were, though no longer commercially exploited, nonetheless subject to existing copyright. These films too are "orphan" works. Although Prelinger Archives wishes to make these orphan films available to patrons on the same basis as the archive's public domain materials, the process of locating rights holders for many of these works is too costly and uncertain. As a result, the part of the collection subject to continuing copyright protection is available only on a very limited basis. The Archive can make no copies of the works, nor can it permit transformative re-use of this work. Because of

copyright's burden, neither the rights holders nor the public are able to benefit from these works.

78. Plaintiffs' desire is to give access to cultural and scientific work no longer commercially available. But for the burdens created by the indiscriminate extension of copyrights from 1964 on, plaintiffs would continue their work of making commercially unavailable material accessible through their archives. Both archives seek to collect and make available material from throughout our history, but most importantly, from our recent past. Yet indiscriminate extensions of the copyright term have significantly burdened that work.

COUNT ONE: First Amendment

79. Plaintiffs repeat and reallege paragraphs 1 through 78.

80. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of speech, or of the press."

81. In *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003), the Supreme Court held that "when ... Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

82. By implication, when Congress does alter "the traditional contours of copyright protection, further First Amendment scrutiny" should be necessary.

83. As alleged in paragraphs 32 through 44, "the traditional contours of copyright protection" in America established a conditional copyright regime. Copyrights were granted, and maintained, only if rights holders took affirmative steps to secure their rights.

84. These "traditional contours of copyright protection" served important First Amendment interests. By requiring copyright owners to signal a desire to continue the protection of copyright, the traditional requirement of renewal limited copyright to just those works whose owners had a sufficient continuing interest in restricting use of the work. Likewise, the registration and notice requirements provided clarity by identifying copyright holders and the term of protection, thus facilitating the spread of knowledge through use of public

domain material and licensing of works still under copyright. Like the doctrine of "fair use," these structural limitations on the scope of copyright's regulation narrowly tailored the reach of the law to those contexts within which the regulation would act as an "engine of free expression." *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545 (1985). It likewise excluded copyright from those contexts within which the regulation would simply act as a brake on free expression.

85. As alleged in paragraphs 45 through 61, beginning in 1976, Congress altered the "traditional contours" of copyright law. By eliminating the renewal requirement, Congress eliminated the mechanism by which unnecessary copyrights can be removed. By eliminating the registration, deposit, and notice requirements, Congress has brought within the domain of copyright entire classes of works for which protection was never desired, and then compounded the damage to speech by removing the traditional means by which the owners of copyrighted material can be identified.

86. All of these changes burden speech. Eliminating the renewal requirement burdens the speech of Plaintiffs by limiting their ability to exploit material no longer exploited by the copyright holder. Eliminating the registration and notice requirements burdens the speech of Plaintiffs by extending copyright's domain to a large amount of work for which no protection is desired, while significantly increasing the cost of identifying the owners of creative work.

87. Because these changes have altered the "traditional contours" of copyright, they should be evaluated under ordinary First Amendment scrutiny. Under either strict or intermediate review, the burdens created by these changes for certain categories of copyrighted work far outweigh any plausible benefits.

88. In particular, with respect to works created after January 1, 1964, and before January 1, 1978, these changes have imposed an unconstitutional burden on speech. The term for work created between January 1, 1964 and December 31, 1977 was extended by 19 years by the Copyright Act of 1976. The term was then automatically renewed by the BCIA in 1992. Finally, the term was unconditionally extended by 20 years by CTEA in 1998.

Thus, even though historical data suggests that more than 85% of this work would never have had its copyright renewed, the law has automatically extended the term for all of this work by 67 years. This is the first category of copyrighted works in the history of the American Republic which has had its term extended automatically without ever passing through the filter of renewal.

89. These changes to the copyright laws, as they are applied to and affect a large volume of creative work that would never have had its copyright renewed, do not advance any legitimate government interest. They instead impose substantial burdens on speech without advancing the only legitimate interest the government might have — namely, to benefit the small minority of work that continues to have commercial value. They therefore should be declared unconstitutional as applied to the works identified and as to Plaintiffs.

90. A declaratory judgment will terminate the controversy between the parties.

COUNT TWO: "Limited Times"

91. Plaintiffs repeat and reallege paragraphs 1 through 90.

92. Article I, sec. 8, cl. 8, of the Constitution grants Congress the power to "Promote the Progress of Science."

93. That power is subject to a number of implied and expressed constitutional limits.

94. Among the expressed limits is the prescription that terms be "limited."

95. While the Supreme Court has not yet interpreted fully the meaning of "limited," in *Eldred v. Ashcroft*, the Court indicated that "limited" means something more than simply a fixed term. As the Court acknowledged, and as the government conceded, a term may be fixed yet exceed the "outer boundaries" of a "limited" term. A term of 500 years may in one sense be "limited," but it would not be "limited" in the sense meant by the Constitution.

96. The Court in *Eldred* did not, however, indicate the standard to determine whether a term is so long as to be effectively perpetual. In dicta, while the Court suggested that "[c]alibrating rational economic incentives . . . is a task primarily for Congress, not the

courts," 537 U.S. at 207 n.15, the Court also expressly recognized that petitioners in *Eldred* had not raised the claim that copyrights had become so long as to be effectively perpetual. 537 U.S. at 199.

97. Justice Breyer in dissent argued that copyright terms had become so long as to be effectively perpetual. Using a discounted present value analysis, Justice Breyer calculated that the current term for work made for hire (95 years) returns to the creator 99.9997% of the value of a perpetual term. This, Justice Breyer concluded, is an effectively unlimited term.

98. The method of discounted present value used by Justice Breyer to conclude that the term of copyright had become effectively perpetual was well known to the Framers. Eighteenth Century financial practices routinely valued property leases using the same formula relied upon by Justice Breyer. A 99-year lease was understood to be the economic equivalent of a fee simple transfer. Because the present value of that lease was the same as a fee simple transfer, it was considered to be the equivalent of a perpetual term.

99. Under current law, the term of copyright ranges from 95 years for works made for hire, to life of the author plus 70 years for ordinary works. In years, this means a range between 95 and 150 years. Under the analysis the framers would have applied to a term between 95 and 150 years, those terms would have been considered "effectively perpetual."

100. This extreme term, moreover, is the product of very recent changes. As described in paragraphs 35 through 44, until the 1976 Act, the term of copyright in the United States was bifurcated. The vast majority of copyright holders never renewed their copyright. Thus, while the maximum term until 1978 was 56 years, the average term was never more than 34.1 years. In just 30 years, that average term has now tripled — from a maximum average term of 34.1 years in 1973, to 95 years for corporate works today.

101. At least with respect to work first published on or after January 1, 1964 and before January 1, 1978, and that has not been renewed, this term has become effectively perpetual. It is therefore not "limited" under the ordinary and obvious meaning that the Framers intended in Article I, §8, cl. 8.

102. A declaratory judgment will terminate the controversy between the parties.

COUNT THREE: "Promote . . . Progress"

103. Plaintiffs repeat and reallege paragraphs 1 through 102.

104. Article I, sec. 8, cl. 8, of the Constitution grants Congress the power to "Promote the Progress of Science."

105. In addition to enumerating a legislative power, the "Promote . . . Progress" language also imposes a constraint. As the Supreme Court stated in *Eldred v. Ashcroft*, "[t]he constitutional command . . . is that Congress, to the extent it enacts copyright laws at all, create a system that 'promotes the Progress of Science.'" 537 U.S. 186, 212 (2003) (internal quotations and citations omitted). Congress "may not overreach the restraints imposed by the stated constitutional purpose." *Graham*, 383 U.S. at 5-6. And although Congress is ordinarily permitted to make its own determination whether a particular change to the copyright laws will promote progress, Congress's lawmaking in this area remains subject to judicial review.

106. By altering the copyright laws from a conditional to an unconditional system, as is enumerated in paragraphs 35 through 61, Congress has moved from a system that kept faith with its constitutional obligation to "Promote . . . Progress" to one that does not.

107. Congress' removal of formalities from the copyright laws makes both the identification and use of public domain works and the licensing of works still under copyright more costly, risky, and uncertain. This occurs in at least two ways:

(1) By eliminating the renewal requirement, Congress has eliminated the mechanism by which unnecessary copyrights can be removed. Congress has thereby limited the ability of would-be users to exploit the vast majority of copyrighted material that would otherwise, after a relatively short period of protection, be dedicated to the public domain.

(2) By eliminating the registration, deposit, and notice requirements, Congress has brought within the domain of copyright entire classes of works for which protection was never desired, and then compounded the damage to both public domain use and licensing by removing the traditional means by which the owners of copyrighted material can be identified. The existence of large numbers of "orphaned" works — i.e., books, films, music, and other creative works that are still under copyright but are no longer being published or otherwise commercially exploited — illustrates the extent to which the transformation of our copyright laws from a conditional to an unconditional system has failed to promote progress.

108. In contrast to the substantial burdens that an unconditional copyright system imposes on the licensing and use of public domain works, the removal of copyright conditions provides no cognizable benefit to authors or the public that could not have been obtained without the removal of conditions. Nor does an unconditional copyright system provide public benefits that are even arguably commensurate with and proportional to the benefits that could be provided via a properly constructed conditional copyright system.

109. In sum, in moving from a conditional to an unconditional copyright system, Congress has failed to promote progress, and thus has acted beyond the scope of its power under the Progress Clause.

110. In particular, extending the term of works that are not filtered by the formalities of a conditional copyright regime — in light of the extraordinary opportunity cost that has arisen as the Internet has removed non-copyright barriers to creation, preservation, and dissemination of creative works — is beyond the power of Congress.

111. A declaratory judgment will terminate the controversy between the parties.

COUNT FOUR: "Limited Times" II

112. Plaintiffs repeat and reallege paragraphs 1 through 111.

113. *Eldred v. Ashcroft* rejected the claim that Congress exceeds its Progress Clause power when it extends the term of existing copyrights. In the Supreme Court's view, Congress's historical practice of extending existing terms justified Congress's continued power.

114. The Court in *Eldred* did not consider that every extension before CTEA applied to works whose terms had to be renewed. CTEA was the first statute to purport to extend the term of works that would never be filtered by a requirement of renewal.

115. This change in a fundamental contour of copyright's free speech protections should lead the Court to reconsider its decision in *Eldred*, and hold that within an unconditional copyright regime, Congress has no power to extend the terms of existing copyrights.

116. Because the prospective aspects of CTEA are not severable from the retrospective aspects, the Act as a whole must be invalidated.

117. A declaratory judgment will terminate the controversy between the parties.

WHEREFORE, plaintiffs Brewster Kahle, Richard Prelinger, Internet Archive, and Prelinger Associates, Inc. request that this Court enter judgment:

(1) Declaring that BCIA is unconstitutional by virtue of the First Amendment;

(2) Declaring that the BCIA has violated the "limited Times" prescription of Article I, sec. 8, cl. 8, by establishing terms that are so long as to be effectively perpetual;

(3) Declaring that BCIA is unconstitutional for failing to "promote … Progress;"

(4) Declaring that BCIA and CTEA are unconstitutional to the extent they extend the terms of copyrights that have not, and will not, be renewed;

(5) Enjoining defendant, his successor, and their subordinates from enforcing the NET Act, 17 U.S.C. 506(a) against persons whose

infringement of a copyright would not have happened but for 17 U.S.C. §§ 302-304, as amended by the CTEA, for works in their renewal term between January 1, 1964 and December 31, 1977, and otherwise;

(6) Awarding plaintiffs the costs of this action, including reasonable attorneys' fees, AND

(7) Awarding such further relief as the Court deems just and appropriate.

Dated: March 22, 2004

Respectfully submitted,

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